

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ECF CASE

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NATURAL RESOURCES DEFENSE :
COUNCIL, INC., :

Plaintiff, :

06 Civ. 2676 (JSR)

- against - :

STIPULATION AND ORDER

UNITED STATES ENVIRONMENTAL :
PROTECTION AGENCY; and the :
UNITED STATES DEPARTMENT OF :
JUSTICE, :

Defendants. :

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WHEREAS, defendant Environmental Protection Agency ("EPA") continues to recognize the importance of timely responses to requests under the Freedom of Information Act ("FOIA") for records relating to the Hudson River PCBs Superfund Site ("Site"); and

WHEREAS, the parties expect that certain categories of records similar to some of those at issue in this action will be generated on a recurring basis in connection with EPA's work on the Site, and that plaintiff Natural Resources Defense Council, Inc. and other similar environmental and community organizations (including the organizations comprising the Friends of a Clean Hudson coalition ("FOCH"), of which plaintiff is a member) concerned with the cleanup of the Site are likely to request the release of many such records on a recurring basis; and

WHEREAS, the parties seek to reduce the potential for delays in the processing of, and the potential for litigation related to, future FOIA requests submitted by plaintiff or FOCH (or its

other member organizations) for records concerning the Site that are similar to some of those at issue in this action; and

WHEREAS, EPA affirms generally its expectation that, in the future, certain categories of records concerning the Site will be released, subject to certain limitations, as described more fully in Attachment 1 (“EPA Statement of Expectations With Respect to Future Release of Certain Categories of Records Concerning the Hudson River PCBs Superfund Site”) to Exhibit A (“Agreement”), which is attached to this Stipulation and Order; and

WHEREAS, the parties continue to disagree as to the applicability of certain statutory exemptions asserted by defendants as bases for withholding certain individual records and certain categories of records at issue in this action (which categories of records are likely to be generated on a recurring basis), but agree that it is in the best interests of the parties to establish certain procedures relating to the processing, in the future, of FOIA requests submitted by plaintiff or FOCH (or its other member organizations) concerning certain categories of records concerning the Site that are referenced in Attachment 1 to Exhibit A to this Stipulation and Order and for the efficient resolution, if possible, of disputes that may arise in the future as to the release of specific records falling within those categories; and

WHEREAS, the parties believe that it is currently in the best interests of the parties and the public to focus their respective energies on the successful implementation of a cleanup of the Site, rather than engaging in further litigation over the validity of defendants’ continued withholding of certain records relating to the Consent Decree (defined in Exhibit A to this Stipulation and Order) and an “Intermediate Design Report” concerning the Site cleanup;

NOW, THEREFORE, the parties, by their undersigned representatives, hereby agree as follows:

1. EPA shall release, within fourteen days of the Court's entry of this Stipulation and Order, the following documents, as identified and numbered in EPA's Vaughn Index, dated June 9, 2006: documents numbered 55, 341, 416, 425, 554, 972, 1677, and 1680.

2. This action is hereby dismissed with prejudice.

3. Notwithstanding paragraph 2, this Court retains jurisdiction to determine, upon motion by plaintiff, whether EPA has substantially violated the Agreement set forth in Exhibit A to this Stipulation and Order, and has not cured such violation promptly after receiving notice from plaintiff that plaintiff believes EPA substantially violated that Agreement. If this Court determines that EPA has substantially violated that Agreement, and has not promptly cured such violation after receiving notice of such violation from plaintiff, this action shall be reinstated. Reinstatement of this action pursuant to this paragraph shall constitute plaintiff's sole remedy under the Agreement, and no other remedies, including but not limited to contempt sanctions, may be requested by plaintiff or ordered by the Court for any alleged breach of the Agreement. If this action is reinstated pursuant to this paragraph, the parties' claims and defenses are preserved in full as if the action had not been previously dismissed.

4. Notwithstanding paragraph 2, the Court retains jurisdiction over any application by plaintiff under FOIA for attorneys' fees and/or litigation costs. Any such application shall be filed within sixty (60) days after the Court enters this Stipulation and Order. If this action is reinstated pursuant to paragraph 3 of this Stipulation and Order, nothing herein shall be deemed to

waive or bar any claims plaintiff may have for recovery of fees or costs under FOIA arising from the motion to reinstate the action and any litigation of the action subsequent to reinstatement, and defendants reserve any and all arguments in opposition and defenses to any such claims.

5. In the event plaintiff makes an application pursuant to paragraph 4 for attorneys' fees and/or costs, defendants agree not to argue in opposition to such application that the fact that the Agreement set forth in Exhibit A to this Stipulation and Order is referenced herein in the manner set forth in paragraph 3, rather than included in the body of this Stipulation and Order or referenced herein in any other manner, diminishes, impairs, or otherwise prejudices plaintiff's application for fees and/or costs. The fact that the Court retains jurisdiction over an application for fees and/or costs pursuant to paragraph 4 shall not indicate in any way that plaintiff is entitled to recover any fees or costs under FOIA. Except as stated in this paragraph, defendants reserve any and all arguments in opposition and defenses to any application by plaintiff for fees and/or costs pursuant to paragraph 4.

6. Plaintiff hereby withdraws its April 27, 2006, request to EPA under FOIA (assigned EPA tracking number 02-RIN-0124406), and agrees not to refile such request. Plaintiff also hereby withdraws the second part of plaintiff's December 13, 2005, request to defendant the United States Department of Justice under FOIA, to the extent this request had not been previously withdrawn.

7. Nothing in this Stipulation and Order shall constitute an admission of liability or fault on the part of defendants, or their agents, servants or employees, and is entered into by both

parties for the sole purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.


8. This Stipulation and Order constitutes a final judgment pursuant to Fed. R.

Civ. P. 54.

DATED: New York, New York
September 27, 2006


NATURAL RESOURCES DEFENSE
COUNCIL, INC.

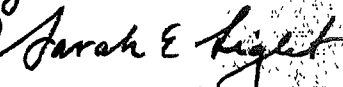
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SL-9869

SO ORDERED:

United States District Judge

Exhibit A

to

Stipulation and Order,
*Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency and U.S.
Department of Justice*, 06 Civ. 2676 (SDNY) (JSR)

AGREEMENT

The undersigned agree as follows:

I. Definitions

As used herein and in Attachment 1 hereto:

“Consent Decree” means the Consent Decree between the United States and General Electric Company which was lodged in October 2005 in the case *United States of America v. General Electric Company*, Civil Action No. 05-CV-01270 (NDNY) (DNH/RFT).

“FOIA” means the Freedom of Information Act, 5 U.S.C. § 552.

“FOIA Request” means any written request which is made in the future by a Requestor, on behalf of Friends of a Clean Hudson (“FOCH”) or a member organization thereof, to the EPA Region 2 FOI Officer (in accordance with 40 C.F.R. § 2.101) and copied to the EPA Region 2 employee designated pursuant to paragraph 1, below, for records some or all of which fall within one or more of the general categories referred to in Attachment 1 hereto; provided that if after receiving a request for records that fall within one or more of those categories, EPA is not able to identify any records in its possession that fall within such categories (other than records that have already been provided to FOCH or one of its member organizations), then the request will be handled as an ordinary request under FOIA but not be deemed a “FOIA Request” for purposes of this definition.

“Friends of a Clean Hudson” (or “FOCH”) means the Friends of a Clean Hudson coalition of organizations, which includes (as of September 2006) Arbor Hill Environmental Justice Corporation, Environmental Advocates of New York, Hudson River Sloop Clearwater, Natural Resources Defense Council (“NRDC”), New York Public Interest Research Group, New York Rivers United, Riverkeeper, Scenic Hudson, the Sierra Club, and the U.S. Public Interest Research Group.

“Requestor” means a person designated pursuant to paragraph 4, below, to submit FOIA Requests for purposes of the procedure set forth herein.

“Written” or “in writing” shall include correspondence sent by e-mail.

Any terms not defined herein shall have the meaning ascribed to them, if any, under FOIA and EPA’s FOIA regulations.

II. Procedure for Future FOIA Requests and EPA Responses

The following provisions shall be effective upon the Court’s approval of the Stipulation and

Order to which this Agreement is an Exhibit.

1. EPA shall designate, by written correspondence to NRDC, at least one member of the EPA Region 2 Hudson River Team to receive a copy of any FOIA Requests from a Requestor. EPA shall make such designation within five working days of the effective date referenced above. If any Requestor submits a FOIA Request on or after such effective date but prior to EPA's designation of a representative under this paragraph, Douglas Fischer of the EPA Region 2 Office of Regional Counsel shall be deemed the "EPA Region 2 employee designated pursuant to" this paragraph, for purposes of the definition of a "FOIA Request" in Part I, above.
2. EPA shall designate, by written correspondence to NRDC, one representative (and one alternate), who shall be a member of the EPA Region 2 Hudson River Team (or a supervisor of an EPA Region 2 Hudson River Team member) with decisionmaking or recommendatory authority concerning the EPA Region 2 Office of Regional Counsel's decision to release or withhold records sought in FOIA Requests (and who may, at EPA's option, be the same person as the one designated under paragraph 1), to confer with the Requestor pursuant to paragraph 7, below. EPA shall make such designation within five working days of the effective date referenced above.
3. Upon written notice to the FOCH representative(s) designated pursuant to paragraph 4, EPA may at any time change its designees under paragraphs 1 and 2.
4. NRDC, on behalf of FOCH, shall designate, by written correspondence to EPA, up to two individual representatives of FOCH to serve as Requestors. NRDC shall make such designation within five working days of the effective date referenced above. Upon written notice to the EPA employee designated under paragraph 1, any person designated under this paragraph may at any time withdraw as a designee and simultaneously name as a replacement designee another individual representative of FOCH. If at any time there are fewer than two FOCH designees, NRDC may name a replacement designee, by written notice to the EPA employee designated under paragraph 1.
5. EPA agrees that for purposes of FOIA Requests, as defined herein:
 - (a) NRDC represents, and EPA accepts such representation, that FOCH and its member organizations are not, at this time, commercial organizations and do not have any commercial interests in the categories of records referred to in Attachment 1. If EPA obtains new information which indicates that FOCH or one of its member organizations may be a commercial organization or have a commercial interest in any of those categories of records, EPA will so inform the Requestor to give him or her a reasonable opportunity to provide explanatory information regarding those issues;
 - (b) based on NRDC's November 2, 2005 letter to the EPA Region 2 FOI Officer,

FOCH (through NRDC) has the ability and intention to disseminate information about the Site broadly to the public; and

(c) the categories of records referred to in Attachment 1 concern the operations or activities of the government.

However, nothing herein shall be read to waive any requirements to address the factors referred to in 40 C.F.R. § 2.107(l)(2)(ii)-(iv) in any request to EPA, under 40 C.F.R. § 2.107(l), for a fee waiver concerning a FOIA Request.

6. If EPA has not responded in full to a FOIA Request by the deadline provided for under EPA's FOIA regulations, EPA shall contact the Requestor to inform him of the status of EPA's response to the Request, if EPA has not already done so.

7. Within 10 calendar days following a written determination by EPA to withhold, in whole or in part, one or more of the records sought by a FOIA Request, EPA shall make available its representative (or alternate) designated pursuant to paragraph 2, above, who shall be familiar with the issues associated with EPA's decision to withhold the record(s), to discuss with the Requestor the bases of the determination (including with regard to the context of the particular records or groups of records being withheld, to the extent such information is not confidential). (Rather than waiting until it issues a written determination, EPA may, at its option, make its representative (or alternate) available for such a discussion with the Requestor before EPA issues a written determination to withhold such records. In such a case, EPA shall, prior to the time of the discussion, provide the Requestor with information of the same type as is referred to in 40 C.F.R. § 2.104(h)(2) with respect to the records that EPA has tentatively concluded should be withheld (hereinafter, "tentative determination"). This provision shall not be deemed to waive EPA's obligation to respond formally to a FOIA Request by the deadline provided for under EPA's FOIA regulations.)

8. Any EPA determination to withhold, in full or in part, records sought in a FOIA Request shall be accompanied by a determination as to the existence of any segregable non-exempt material within the fully or partially withheld records. If EPA's determination to withhold one or more of the records, or portions thereof, sought by a FOIA Request is based in whole or in part on one of the exceptions referred to in Attachment 1, EPA shall, as part of its written determination to withhold the records, inform the Requestor of that fact and explain which of the records, portions of records, and/or categories of records, are covered by the respective exceptions. When EPA relates to the Requestor, pursuant to paragraph 7, a tentative determination to withhold one or more of the records sought by a FOIA Request, if such tentative determination is based in whole or in part on one of the exceptions referred to in Attachment 1, EPA shall, prior to or during the discussion referred to in paragraph 7, inform the Requestor of that fact and explain which of the records, portions of records, and/or categories of records, are covered by the respective exceptions.

9. Within three working days after a discussion between EPA's designated representative and the Requestor pursuant to paragraph 7, the Requestor may inform the EPA representative, in writing, whether the Requestor still seeks some or all of the withheld records or parts thereof. Upon receipt of any such correspondence (if the correspondence indicates that the Requestor does still seek the records), the EPA representative shall promptly (within three working days, if possible) inform the Requestor orally or in writing whether EPA will reverse in full or in part the determination (or tentative determination) to withhold requested records and shall promptly release any records subject to any such reversal. If EPA reverses, in full or in part, a prior written determination regarding the FOIA Request, EPA shall notify the Requestor in writing accordingly; such notification shall include an explanation of the bases for any modified determination to withhold records, consistent with paragraph 8.

10. If EPA informs the Requestor pursuant to paragraph 9 that it will continue to withhold records that the Requestor continues to seek, the Requestor may, within five working days, request a discussion with the EPA Region 2 Regional Counsel concerning the determination (or tentative determination) to withhold records sought by the Requestor. Following such a request, the Region 2 Regional Counsel shall make himself reasonably available for such a discussion, which generally will take place at the next of the bi-monthly (*i.e.*, happening once every two months) meetings between EPA and FOCH referred to in separate correspondence between EPA and FOCH; except that if such meeting is not expected to take place for more than 30 calendar days, then, if specifically requested by the Requestor, the EPA Region 2 Regional Counsel shall make himself reasonably available for such a discussion within 15 calendar days, outside of the context of that bi-monthly meeting, provided that the Regional Counsel shall not be required to do so more than two times in any calendar year. NRDC also understands that while EPA expects that the Regional Counsel will be reasonably available for the discussions referred to in the preceding sentence, it is possible that there will be one or more occasions when the Regional Counsel will not be available during those times, due to his absence from the office or other compelling reason, and in that event, an individual acting in the Regional Counsel's stead will be available to carry out those discussions with the Requestor.

11. At any time after the date when GE notifies EPA, pursuant to subparagraph 15.c. of the Consent Decree, as to whether it will perform Phase 2 of the Remedial Action, or after four years have elapsed from the effective date of this Agreement, whichever is earlier -- or, if the Consent Decree is not entered by the United States District Court for the Northern District of New York, then at any time after three years have elapsed from the effective date of this Agreement -- EPA may, at its discretion, terminate its obligation to comply with the procedure set forth herein, by notice to the Court stating that EPA believes that the procedure is no longer practicable or in the public interest; provided, however, that EPA must first contact one of the FOCH representatives designated under paragraph 4, above, to discuss, in good faith, EPA's desire to terminate the procedure and whether an alternative to termination may be acceptable to both EPA and FOCH. In addition, if pursuant to Paragraph 3 of the Stipulation and Order in *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency and U.S. Department of Justice*, 06 Civ. 2676 (SDNY) (JSR), NRDC reinstates said civil action, this Agreement shall be deemed

automatically terminated.

12. Nothing herein shall be deemed to waive any obligations or rights of EPA under FOIA or under EPA's FOIA regulations, whether or not such obligations or rights are explicitly reserved herein. In addition, nothing herein should be read to modify in any way the deadlines set forth in FOIA or EPA's FOIA regulations for EPA to respond to FOIA requests or administrative appeals or for anyone to appeal from an adverse determination regarding a FOIA request. The filing (or non-filing) of an administrative appeal with respect to a FOIA Request shall not affect EPA's obligation to comply with the process set forth above.

13. Nothing herein shall be deemed to constrain any individual or organization from submitting any request for agency records in any manner authorized by law.

Dated: New York, NY
September 27, 2006

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

By: 

Eric Schaaf
Regional Counsel
U.S. Environmental Protection Agency
Region 2

NATURAL RESOURCES DEFENSE
COUNCIL, INC.

By: 

Lawrence M. Levine
Project Attorney

ATTACHMENT 1

to

Exhibit A of Stipulation and Order,
*Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency and U.S.
Department of Justice*, 06 Civ. 2676 (SDNY) (JSR)

EPA Statement of Expectations With Respect to Future Release of Certain Categories of Records
Concerning the Hudson River PCBs Superfund Site

1. EPA expects to release reasonably promptly to the representatives of Friends of a Clean Hudson ("FOCH") designated pursuant to Paragraph II.4. of the Agreement to which this "Statement of Expectations" is attached, without the need for the submission of a FOIA Request, any records newly generated or obtained by EPA that fall within the following categories, subject to the limitations noted below:

- a. any "deliverable" (*i.e.*, work plan, report, or other similar document that General Electric Company ("GE") is required to submit) submitted by GE under the Consent Decree, the Administrative Order on Consent, Index No. CERCLA-02-2002-2023, which EPA issued to GE on July 23, 2002 with respect to the Hudson River PCBs Site (the "Site"); the Administrative Order on Consent for Remedial Design and Cost Recovery, Index No. CERCLA-02-2003-2027, which EPA issued to GE on August 13, 2003 with respect to the Site, or under any future judicial or administrative settlement or order (collectively, "Orders"; individually, "Order") entered into or issued by EPA with respect to the Site;
- b. any formal comments submitted by EPA to GE on any deliverables submitted by GE under an Order;
- c. any correspondence that is submitted to EPA by other federal agencies (other than the U.S. Department of Justice ("DOJ"), or the U.S. Army Corps of Engineers ("Corps")), or by New York State agencies, as formal or official comments of such agency on any deliverables submitted by GE under an Order, except in instances where the submitting federal/state agency considers its comments to be legally privileged or EPA believes that the given comments are covered by FOIA Exemption 7A (5 U.S.C. § 552(b)(7)(A)). If the submitting federal/state agency indicates that it considers its comments to be legally privileged, EPA will evaluate whether it believes there is a legal basis for withholding the comments under FOIA. If EPA believes there is no legal basis for it to withhold the comments or otherwise believes the comments should be released, and if the submitting agency is a party to the Joint Prosecution and Confidentiality Agreement Among New York State and Federal Departments and Agencies Concerning the Hudson River PCBs Superfund Site ("Joint Prosecution Agreement"), then any such disagreement will be resolved by EPA and the submitting agency in accordance with the procedure set forth in the Joint Prosecution Agreement. If the submitting federal/state agency is not a party to the Joint Prosecution Agreement, then EPA would seek to resolve the disagreement with the other agency in a manner that is consistent with the procedure set forth in the Joint Prosecution Agreement or in some other appropriate manner;

- d. any new, validated, analytical results received by EPA of samples collected in connection with the remedial design, the implementation of the remedial action at the Site, or any additional investigations authorized, conducted or ordered by EPA at the Site; provided that in instances where EPA is releasing such data to the public as a whole – e.g., by posting the data on EPA’s Hudson River PCBs Web site – it will not be necessary for EPA to also send the data directly to FOCH. With respect to the analytical results of any samples collected on residential property, EPA may withhold information that it asserts to be within FOIA Exemption 6 (5 U.S.C. § 552(b)(6)) in order to protect personal privacy.

Subject to the limitations noted above, EPA expects to release the records described above reasonably promptly once they come into EPA’s possession, except that it currently expects to release the comments described in subparagraph 1.c. (subject to the limitations noted in that subparagraph) either reasonably promptly after such comments come into EPA’s possession or reasonably promptly after EPA sends to GE its own comments on the respective deliverable.

2. Upon receipt of a FOIA Request, EPA expects to release to the Requestor any requested records falling within the following categories, subject to the limitations noted below:

- a. any records described in subparagraphs 1.a.-d., above, subject to the same limitations expressed in those subparagraphs; except that to the extent any such record has already been released to a FOCH designee pursuant to paragraph 1 above, EPA does not intend to provide a duplicate copy of the same record to the Requestor;
- b. any post-May 26, 2006 correspondence between EPA (or DOJ, on EPA’s behalf) and GE that concerns the implementation of an Order, except:
 - i. correspondence exchanged as part of settlement negotiations between EPA and GE, where EPA believes such correspondence is covered by FOIA Exemption 7A; and
 - ii. with respect to correspondence between EPA (or DOJ, on EPA’s behalf) and GE that is sent in connection with a dispute resolution process taking place between EPA and GE under an Order, while EPA’s general practice will be to treat such correspondence as public information, EPA expects that there may be instances where it will treat such correspondence, or portions thereof, as confidential on the grounds that EPA believes it is covered by FOIA Exemption 7A.
- c. any technical analyses written by EPA staff, EPA contractors, other federal agencies, or New York State agencies, upon which EPA has relied in making material decisions on technical issues arising during the implementation of an

Order, to the extent such technical analyses are of a nature that would ordinarily be provided to the public (and/or to a court) as part of an administrative record supporting an EPA decision for which an administrative record is produced;

- d. any formal or official comments or analyses submitted to EPA in the future by other federal agencies (other than DOJ or the Corps), or by New York State agencies, that concern the implementation of an Order, but which are not comments on a deliverable submitted by GE under an Order and are not records of the type described in subparagraph 2.c. above, except in instances where the submitting federal/state agency considers its comments or analyses to be legally privileged, EPA believes that the given comments or analyses are covered by FOIA Exemption 7A, or EPA believes that the comments or analyses are covered by the deliberative process privilege. If the submitting federal/state agency indicates that it considers its comments or analyses to be legally privileged, EPA will evaluate whether it believes there is a legal basis for withholding them under FOIA. If EPA believes there is no legal basis for it to withhold the comments or analyses or otherwise believes they should be released, and if the submitting agency is a party to the Joint Prosecution Agreement, then any such disagreement will be resolved by EPA and the submitting agency in accordance with the procedure set forth in the Joint Prosecution Agreement. If the submitting federal/state agency is not a party to the Joint Prosecution Agreement, then EPA would seek to resolve the disagreement with the other agency in a manner that is consistent with the procedure set forth in the Joint Prosecution Agreement or in some other appropriate manner.

- 3. If GE asserts a claim of business confidentiality with respect to a record that it submits to EPA, and such claim is not precluded by law or by a settlement agreement, then for such records EPA will follow the procedures set forth in 40 C.F.R. Part 2, Subpart B, and any other laws that protect commercial information.